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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re EMMANUEL G., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EMMANUEL G.,

Defendant and Appellant.

G042217

(Super. Ct. No. DL030840)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Ronald P. Kreber, Judge. Affirmed as modified.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

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The juvenile court found Emmanuel G. (Emmanuel) committed a battery for the benefit of a criminal street gang. Emmanuel does not challenge the underlying battery allegation, but contends the evidence does not support the gang allegation. He also challenges one of his probation terms. We modify the probation condition and affirm.

## I

### FACTS

A juvenile delinquency petition alleged Emmanuel committed a battery (Pen. Code,<sup>1</sup> § 242, a misdemeanor) for the benefit of a criminal street gang (§ 186.22, subd. (d)). The court found the allegations true beyond a reasonable doubt after a contested hearing, deemed the battery a felony pursuant to the gang allegation, and placed Emmanuel on probation.

Ramiro M. was eating lunch in the El Modena High School cafeteria on September 25, 2008. Emmanuel, who Ramiro had never seen before, was two tables away. They were “mad-dogging” each other, “looking at each other bad” or giving “dirty looks.” They said, “What happened?” to each other and stood up. Emmanuel approached to within a foot of Ramiro and asked him where he was from. Ramiro responded, “Dark Side,” the name of a gang. Emmanuel said, “OVC,” and punched Ramiro in the face. A fight ensued.

Detective Ted Taketa of the Orange Police Department testified as a gang expert. He testified Orange Varrio Cypress (OVC) is a criminal street gang and its primary activities include attempted murder, assault with a deadly weapon, and illegal firearm violations. Taketa testified Emmanuel is an active participant of OVC. After the prosecutor gave Taketa a hypothetical question containing the facts of this case, Taketa stated the battery in the hypothetical question would have been for the benefit of OVC.

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

## II DISCUSSION

### *Issue and Standard of Review*

Emmanuel argues the evidence is insufficient to support the section 186.22, subdivision (d) gang allegation. Upon finding that allegation true, the court deemed the battery a felony. “(d) Any person who is convicted of a public offense punishable as . . . a misdemeanor, which is committed for the benefit of, at the direction of or in association with, any criminal street gang with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison for one, two, or three years . . . .” (§ 186.22, subd. (d).)

As we stated in *In re Alexander L.* (2007) 149 Cal.App.4th 605, 610 (*Alexander L.*): ““Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]’ (*People v. Olguin* (1999) 31 Cal.App.4th 1355, 1382.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate ““that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” [Citation.]’ (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) The same standard of review applies to section 186.22 gang [allegations]. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.)”

### *There is Sufficient Evidence of the Gang’s Primary Activities.*

As we noted in *Alexander L.*, to qualify as a criminal street gang there must be proof: ““(1) [of] an “ongoing” association of three or more participants, having a

“common name or common identifying sign or symbol”; (2) that the group has as one of its “primary activities” the commission of one or more specified crimes; and (3) the group’s members either separately or as a group “have engaged in a pattern of criminal gang activity.” [Citation.]’ (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.)” (*Alexander L.*, *supra*, 122 Cal.App.4th at pp. 610-611; see § 186.22, subd. (f).) The first and third elements are not at issue here. Relying upon our decision in *Alexander L.*, Emmanuel contends the gang investigator’s testimony regarding the primary activities of OVC — the second element — lacked sufficient foundation, rendering the evidence insufficient.

In *Alexander L.*, the only evidence in support of the primary activities element consisted of the gang expert’s testimony that: “‘I know they’ve committed quite a few assaults with a deadly weapon, several assaults. I know they’ve been involved in murders. [¶] I know they’re involved with auto thefts, auto/vehicle burglaries, felony graffiti, narcotics violations.’” (*Alexander L.*, *supra*, 149 Cal.App.4th 611.) We found this testimony insufficient not only because the expert failed to directly testify those crimes constituted the gang’s primary activities (*id.* at p. 612), but also because, based upon that record, we did not know whether the basis of the expert’s “testimony on this point was reliable, because information establishing reliability was never elicited from him at trial.” (*Ibid.*) As a result, it was “impossible to tell whether his claimed knowledge of the gang’s activities might have been based on highly reliable sources, such as court records of convictions, or entirely unreliable hearsay. [Citation.]” (*Ibid.*, fn. omitted.)

That failing is not present here. Taketa worked in the gang unit for two years. During that two years, he was assigned over 150 gang cases. He has written search warrants for gang members’ residences and has hundreds of hours of formal as well as informal training by local, state, and federal law enforcement agencies on gangs. He has interviewed “well over 500” gang members. On the date of the charged incident,

OVC had 20 to 30 members. Taketa has talked to the same number of OVC members about the gang, weapons, and crimes. Taketa personally investigated 20 to 30 crimes committed by OVC members. He has read over 400 to 500 police reports by other officers concerning OVC members. Unlike the expert in *Alexander L.*, Taketa was “personally aware” of OVC’s primary activities. He said OVC’s primary activities include attempted murder, firearms violations, and assault with a deadly weapon, offenses listed in section 186.22, subdivision (e), not just that he is aware members have committed such offenses. Taketa interviewed OVC members who committed those offenses.

We reject Emmanuel’s contention the evidence does not indicate whether Taketa’s personal knowledge of the primary activities of OVC was based upon unreliable hearsay or some other, reliable source such as court records. Taketa testified the gang’s primary activities include attempted murder. The two predicate acts used to establish the requisite “‘pattern of criminal gang activity’” (see § 186.22, subd. (e)) were convictions of OVC members for attempted murder. Taketa was involved with the arrest in one of the cases and in the investigation of the other. The latter was in retaliation for Emmanuel having been stabbed by a member of another gang. Taketa had interviewed Emmanuel about the incident. It is a fair inference these records that Taketa apparently personally chose among available court records were considered by him in reaching his opinion that attempted murder is one of the gang’s primary activities.<sup>2</sup>

Taketa’s knowledge of OVC, its members, and his investigation of crimes committed by OVC members, support his testimony that he was personally aware of

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<sup>2</sup> The prosecution was late providing Emmanuel’s counsel discovery of the court records relied upon to establish the pattern of criminal gang activity required in subdivision (e) of section 186.22. In explaining why he had not timely complied with discovery, the prosecutor — a former gang prosecutor — represented that the various gang experts have their “own predicates that they are personally familiar with” and he does not always know which gang expert is going to testify in any given trial.

OVC's primary activities. The evidence of the primary activities element of the gang allegation — the only element challenged on appeal — is substantial and of solid value. (*People v. Mayfield* (1997) 14 Cal.4th 668, 790-791.) Accordingly, we conclude the gang allegation is supported by substantial evidence.

### *The Probation Condition*

When the court placed Emmanuel on probation, it announced that one of the conditions of probation was: "Do not associate with probationers, parolees, criminal street or tagging crew members, or users or sellers of alcohol or drugs." Emmanuel requests we modify this probation condition to include a knowledge requirement to cure what is otherwise an unconstitutionally vague and overbroad probation condition. The condition impinges on Emmanuel's constitutional right of freedom of association (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102) and fails to provide him fair notice — a component of due process — of the people he is to steer clear of or face violation of his probation. (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) We have the authority to modify a probation condition to cure this problem. (*Id.* at p. 892; *People v. Garcia*, *supra*, 19 Cal.App.4th at p. 103 [probation condition modified to require knowledge associate is a user or seller of narcotics, a felon or ex-felon].)

The Attorney General points out that the court's minute order from Emmanuel's disposition hearing contains the requisite knowledge requirement missing from the court's oral pronouncement, negating the need to modify the probation condition. In such a situation we would normally deny a request to modify since the disposition order already contains the proper probation condition. However, the condition set forth in the court's minutes contains minor errors so we amend the challenged probation condition to read: "Do not associate with anyone you know is a probationer, parolee, a member of a criminal street gang or tagging crew, or user or seller of alcohol or drugs."

III  
DISPOSITION

The nonassociation probation condition is ordered to be modified to read as follows: “Do not associate with anyone you know is a probationer, parolee, a member of a criminal street gang or tagging crew, or user or seller of alcohol or drugs.” The clerk of the juvenile court is directed to send the probation department a copy of the modified probation condition. In all other respects the jurisdictional and dispositional orders are affirmed.

MOORE, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.